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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

1983 Term

JAMES LAWRENCE CUNNINGHAM,
Appellant,

v.

JUDY BAKER INMAN GOLDEN
and
STEVEN LEE INMAN,
Appellees.

APPEAL FROM THE
TENNESSEE COURT OF APPEALS
EASTERN SECTION

APPELLEES' MOTION TO DISMISS

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QUESTION PRESENTED

Do the Tennessee legitimation and paternity statutes, judicially construed to permit a married woman to assert that a man other than her husband fathered her child, but construed to deny an alleged natural father standing to legitimate a child born to a married woman, violate the due process and equal protection rights of the alleged father?

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NO.

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JAMES LAWRENCE CUNNINGHAM,
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JUDY BAKER INMAN GOLDEN
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STEVEN LEE INMAN,
Appellees.

APPEAL FROM THE
TENNESSEE COURT OF APPEALS
EASTERN SECTION

MOTION TO DISMISS

The appellees JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN respectfully move this Court to dismiss the appeal brought by the appellant JAMES LAWRENCE CUNNINGHAM on the ground that the question presented by this appeal is not substantial enough to require plenary consideration.

STATEMENT OF THE CASE

This appeal brought by the appellant JAMES LAWRENCE CUNNINGHAM is from the decision of the Tennessee Court of Appeals in Cunningham v. Golden, 652 S.W.2d 910 (Tenn. Ct. App.) (appeal denied, Tenn. May 31, 1983), which denied him standing to file a petition for the legitimation of a minor child, DANIEL TODD INMAN, who was born to the appellee JUDY BAKER INMAN GOLDEN while she was married to the appellee STEVEN LEE INMAN. This appeal presents the question whether a state statute that has been construed to deny an alleged natural father standing to rebut the presumption of legitimacy of a child born to a married woman violates the equal protection or due process rights of the putative father.

On November 16, 1977, the appellee

JUDY BAKER INMAN gave birth to a son, DANIEL TODD INMAN. (R. 1, 15) At that time, and at the time the child was conceived, JUDY BAKER INMAN was married to the appellee STEVEN LEE INMAN. (R. 1, 12, 15, 18) About a year after the child's birth, the appellees were divorced on the ground of irreconcilable differences. (R. 6, 34-35) Pursuant to the marriage settlement agreement executed by the couple and incorporated by reference into the final decree of divorce, JUDY BAKER INMAN received custody of the child, and STEVEN LEE INMAN received visitation rights and a child support obligation of \$150.00 a month. (R. 6, 38)

On September 9, 1980, nearly two years after the appellees were divorced and almost three years after DANIEL TODD INMAN was born, the appellant JAMES LAWRENCE CUNNINGHAM filed

a petition for legitimation in the Fourth Circuit Court for Knox County, Tennessee. He asserted that he was the natural father of DANIEL TODD INMAN and requested that, upon a hearing of the matter, the child be declared not born in lawful wedlock and thereafter duly legitimated. (R. 1-3) The appellees JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN jointly acknowledged parentage of the child, and they opposed the petition for legitimation. (R. 4, 15-20) On August 14, 1981, the appellant filed a motion to require the appellees and their child to submit to blood grouping tests to determine whether the appellant or the appellee STEVEN LEE INMAN could be excluded as the father of the child. Before the motion was heard, the appellees moved for summary judgment on the ground that the appellant as a matter of law lacked

standing to assert his paternity of the child. (R. 24-33) After oral argument on the summary judgment motion, the court on October 28, 1981, held that the appellant did not have standing to contest the paternity of the child, and that the interest of the child in preserving his status of legitimacy was paramount. (R. 22-23) On December 7, 1981, the court dismissed the appellant's petition with prejudice and granted summary judgment for the appellees. (R. 41) On February 24, 1983, the Tennessee Court of Appeals, Eastern Section, affirmed the trial court's decision and assessed costs against the appellant. The Supreme Court of Tennessee, per curiam, denied the appellant's application for leave to appeal on May 31, 1983. The appellant's Jurisdictional Statement before this Court was served on August 29, 1983, and, counsel

for the appellees having obtained a time extension, this Motion to Dismiss was timely filed.

The appellees believe that the question as presented by the appellant assumes the existence of facts never established in a judicial proceeding. Accordingly, the appellees have rephrased the question in what they believe is a more objective fashion. In addition, the child is not a party to the proceedings, and the appellees believe that the appellant lacks standing to assert constitutional arguments on behalf of the child. For this reason, the appellees have deleted the appellant's reference to the child's constitutional rights from the question presented.

No statutes or constitutional provisions other than those set forth by the

appellant are necessary for the resolution of this Motion to Dismiss. These provisions appear in the Jurisdictional Statement at 5-8 and are not repeated here.

ARGUMENT

THE QUESTION PRESENTED BY
THIS APPEAL IS NOT SUBSTAN-
TIAL ENOUGH TO WARRANT
PLENARY CONSIDERATION.

The presumption that a child born to a married woman is the child of her husband, and therefore legitimate, is one of the oldest presumptions known to the law. Over two centuries ago, Lord Mansfield stated: "The law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage [I]t is a rule founded in decency, morality, and policy"

Goodnight v. Moss, 98 Eng. Rep. 1257 (1777).

The appellant JAMES LAWRENCE CUNNINGHAM asks this Court to consider whether a state statute that does not confer standing upon an alleged natural father to rebut the presump-

tion of legitimacy of a child born to a woman married to another man at the time of conception and birth violates the equal protection and due process rights of the alleged father. Because such a statute does not violate equal protection or due process guarantees, this case does not merit plenary consideration, and this Court should dismiss the appeal.

- A. TENN. CODE ANN. § 36-302,
AS INTERPRETED BY THE
TENNESSEE COURT OF APPEALS,
DOES NOT VIOLATE A PUTATIVE
NATURAL FATHER'S RIGHT TO
EQUAL PROTECTION OF THE
LAWS.

The appellant JAMES LAWRENCE CUNNINGHAM, the alleged natural father in this case, argues that Tenn. Code Ann. § 36-302 (1977), as interpreted by the Tennessee Court of Appeals in Cunningham v. Golden, 652 S.W.2d 910 (Tenn. Ct. App.) (appeal denied, Tenn. May 31, 1983), denies him equal protection of the laws in contravention of the fourteenth amendment to the United States Constitution. Specifically, he contends that § 36-302, which does not confer standing upon a putative natural father to challenge the presumption of legitimacy of a child born to a woman married to another man, creates an impermissible gender-based classi-

fication when read in conjunction with Tenn. Code Ann. § 36-224 (1977), which allows a mother to bring an action to establish paternity and compel child support. (See Appellant's Jurisdictional Statement at 15-20) For the reasons discussed below, the appellant's argument is without merit.

Chapter 3 of title 36 of the Tennessee Code, §§ 36-301 to 36-309, sets forth procedures for the legitimation of children. Section 36-302 provides: "An application to legitimate a child not born in lawful wedlock is made by petition, in writing, signed by the person wishing to legitimate such child, and setting forth the reasons therefor and the state and date of said child's birth." (Emphasis added.) In Cunningham v. Golden, supra, 652 S.W.2d at 912, the Tennessee Court of Appeals construed the phrase "a child not

born in lawful wedlock" to mean a child born to an unmarried woman, and consequently held that an alleged natural father of a child born to a woman married to another man had no standing to petition for the child's legitimation.

Chapter 2 of title 36 of the Tennessee Code, §§ 36-222 to 36-236, concerns bastardy proceedings. Section 36-224 provides in part:

(1) A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this chapter may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the state department of human services or by any person. Said petition may be filed in the county where the mother or child resides or is found or in the county where the putative father resides or

is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father. After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.

(Emphasis added.) Section 36-222, which defines terms used in the chapter, provides that "child" means "a child born out of lawful wedlock," and "mother" means "the mother of a child born out of lawful wedlock." In Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W.2d 467, 471 (cert. denied, Tenn. Dec. 11, 1964), the Tennessee Court of Appeals construed the statutes to allow a woman who had borne a child while married to bring a paternity action against a man not her husband.

Section 36-302 itself does not create an impermissible classification based upon

gender. The statute permits any person wishing to legitimate a child born to an unmarried woman to file a petition in the appropriate court. Because only men can legitimate children, the statute of necessity applies only to persons of that sex. Any alleged gender-based discrimination must arise from the joint operation of sections 36-302 and 36-224, as interpreted by the Tennessee courts.

Gender-based classifications are not ipso facto invalid. In Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 468 (1981), this Court discussed the appropriate standard of judicial review for legislative classifications based upon gender. Citing Stanton v. Stanton, 421 U.S. 7 (1975) (gender-based classifications are not "inherently suspect" and do not require

"strict scrutiny"), Reed v. Reed, 404 U.S. 71 (1971) (gender-based classifications must bear a "fair and substantial relationship to legitimate state ends"), and Craig v. Boren, 429 U.S. 190 (1976) (gender-based classifications must bear a "substantial relationship to important governmental objectives"), this Court stated:

Underlying these decisions is the principle that a legislature may not "make over-broad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." Parham v. Hughes, 441 U.S. 347, 354 . . . (1979) (Stewart, J., plurality). But because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same," Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), . . . this Court has

consistently upheld statutes where the gender classification is not invidious, but rather reflects the fact that the sexes are not similarly situated in certain circumstances.

450 U.S. at 468 (parallel citations omitted).

Statutes that do not allow a man to petition for legitimation of a child born to a married woman, but permit a married woman to bring a paternity action against a man not her husband, bear a substantial relationship to important governmental objectives. When a married woman bears a child fathered by someone other than her husband, the law nevertheless presumes the child to be the husband's, thereby creating a family unit of mother, legal father, and legitimate child. A state has a strong interest in maintaining this family unit and preserving the child's legitimate status. Even if the mother and legal

father become divorced, the state has a continuing interest in protecting the child's legitimacy and the child's ongoing relationship with his or her legal father. Allowing a putative natural father, who is a stranger to the family unit, to disrupt the family and bastardize the child would totally defeat these substantial state interests, and the child would gain nothing thereby. Permitting the mother, who is part of the family unit, to bring an action to establish the paternity of and compel child support from a man not her husband also might disrupt the family unit, but, as in Frazier v. McFerren, supra, might be necessitated by the legal father's unwillingness or inability to support the child. The member of the family, not the outsider, is in the best position to judge whether disruption of the family unit in

order to obtain child support would be in the child's best interests.

Thus the line drawn by §§ 36-302 and 36-224 actually distinguishes between an outsider to the family unit, the alleged natural father, and an insider, the mother, and the resulting gender-based distinction is merely incidental. Under either the "rational basis" or the "intermediate" standard of review, however, the statutes do not deny equal protection of the laws, because they are substantially related to the important governmental objectives of preserving the family unit, protecting the child's legitimate status, and promoting the best interests of the child.

In A. v. X, Y, & Z, 641 P.2d 1222 (Wyo.), cert. denied, 103 S. Ct. 388 (1982), this Court denied certiorari in a case pre-

senting questions identical to those at issue in this appeal. In A. v. X, Y, & Z, the alleged natural father, A, brought an action to establish his paternity of a child, X. The parties admitted that in early November 1979, A and the child's mother, Y, had engaged in sexual relations. On February 8, 1980, the mother married another man, Z, and gave birth to the child on August 3, 1980. By operation of Wyoming law, the husband Z was presumed to be the child's father. The trial court dismissed the putative father's petition, holding that he lacked standing under the applicable statutes to assert his paternity. 641 P.2d at 1222.

On appeal, the alleged father argued that, because the statutes permitted a woman, married or single, to bring a paternity action against any man, but precluded a man

from establishing paternity of a child born to a married woman, the statutes denied equal protection of the law. The Wyoming Supreme Court reasoned that the distinction between an outsider to the family unit, such as a putative father, and an insider, such as a mother, justified the differential treatment. Accordingly, the court held that the statute did not violate equal protection guarantees, id. at 1226, and this Court denied review. Accord Petitioner F. v. Respondent R., 430 A.2d 1075, 1080 (Del. 1981).

The appellant's reliance on this Court's decisions in Caban v. Mohammed, 441 U.S. 380 (1979), and Stanley v. Illinois, 405 U.S. 645 (1972), is misplaced. Caban is inapposite for two reasons. First, the issue in that case was whether a statute allowing unwed mothers, but not unwed fathers, to ob-

ject to a child's adoption denied equal protection. The question of standing to assert paternity was not involved, and the governmental interest in promoting the adoption of illegitimate children differs significantly from the governmental interest involved in this case, that of maintaining the family unit and the child's status of legitimacy. Second, Caban is not factually analogous. Under Tennessee law, the natural father in Caban could have petitioned to legitimate the children born to the mother because she had been unmarried when the children were conceived and born. The fact that the father was married to another woman at the time would not have affected his standing to petition for legitimation. As for the Stanley decision, neither the family unit interest nor the children's legitimacy were at stake.

The illegitimate children's mother was dead, the state had custody of the children, and all parties conceded that the plaintiff was their father. These facts justified this Court's holding that the state interest underlying a statute which, upon the death of an unwed mother, automatically made her children wards of the state did not warrant differential treatment of married and unmarried couples. In this case, however, the substantial state interests and the presence of an acknowledged legal father justify differential treatment of mothers and putative natural fathers.

Because the classifications created by Tenn. Code Ann. §§ 36-302 and 36-224 are substantially related to the important governmental objectives of preserving the family unit, protecting the child's legitimate

status, and promoting the best interests of the child, they do not deny putative natural fathers equal protection of the laws. For this reason, the question presented by the appellant does not merit plenary review.

B. TENN. CODE ANN. § 36-302,
AS INTERPRETED BY THE
TENNESSEE COURT OF APPEALS,
DOES NOT VIOLATE A PUTATIVE
FATHER'S DUE PROCESS RIGHTS.

The appellant JAMES LAWRENCE CUNNINGHAM also argues that Tenn. Code Ann. § 36-302, as interpreted by the Tennessee Court of Appeals in Cunningham v. Golden, supra, denies an alleged natural father his due process right to a hearing on the issue of his paternity in contravention of the fourteenth amendment to the United States Constitution. (See Appellant's Jurisdictional Statement at 22-26) Because any constitutionally protected interest of a man claiming to be the father of a child born to a married woman is minimal at best, and compelling state interests justify denying such a person standing to legitimate the child, the statute as construed by the Tennessee

Court of Appeals does not violate due process guarantees.

In his Jurisdictional Statement, the appellant neither identifies the nature of his private interest nor demonstrates that the interest is within the fourteenth amendment's protection. The appellees JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN assume that the appellant is alleging that he is constitutionally entitled to a hearing on the issue of his paternity because the right of a natural father to custody of his children is a substantial liberty interest protected by the due process clause.

The appellees recognize that the liberty interests protected by the due process clause include "the right of the individual . . . to marry, establish a home and bring up children" Meyer v.

Nebraska, 262 U.S. 390, 399 (1923), quoted in
Board of Regents v. Roth, 408 U.S. 564, 572
(1972); see also Smith v. Organization of
Foster Families for Equality & Reform, 431
U.S. 816, 862 (1977). The appellants also
acknowledge that Stanley v. Illinois, supra,
in which this Court invalidated on due pro-
cess grounds a state statute which, upon the
death of an unwed mother, automatically made
her children wards of the state, has been
broadly interpreted as recognizing that the
interests of unwed fathers generally are
entitled to constitutional protection. See
Caban v. Mohammed, supra; Quilloin v.
Walcott, 434 U.S. 246 (1978); Note, "Putative
Fathers: Unwed, But No Longer Unprotected,"
8 Hofstra L. Rev. 425 (1980). The general
principle of Stanley does not mean, however,
that a man claiming paternity has a constitu-

tionally protected interest in a determination of his parental status for purposes of obtaining custody or visitation rights with a child conceived and born during the marriage of the child's mother to another man who has not disavowed paternity. First, any liberty interest of a putative natural father in a child legally presumed to be the child of the mother's husband is much weaker than the interest of an unwed father in an illegitimate child whom all parties concede to be his own, as was the case in Stanley. Second, the competing state interests involved in the case of a legitimate child who has a mother and a legal father, such as promoting the marital relationship, maintaining the family unit, and protecting the child's legitimate status, are entirely absent from the case of an unwed father and his illegitimate child.

Thus, even if an alleged natural father such as the appellant had a constitutionally cognizable liberty interest in a child, his interest would be outweighed by the state interests at stake, and a statute that did not allow him standing to petition for the child's legitimation would not deny him due process of law. Accord Petitioner F. v. Respondent R., supra, 430 A.2d at 1078-79; A. v. X, Y, & Z, supra, 641 P.2d at 1226-27.

The appellants recognize that, under certain limited circumstances, a putative natural father's interest in a child born to a married woman may outweigh the state interests and entitle him to a hearing on the paternity issue. For example, in In re Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475, cert. denied, 421 U.S. 1014 (1975), the trial court denied a putative

father standing to assert his paternity of a child born to a married woman, even though the woman and her husband were deceased and the child had become a ward of the state. The California Supreme Court reversed, holding that, because the state interests in promoting the marital relation and protecting the family unit could not be advanced in a case in which the child's mother and presumptive father were dead, the state was constitutionally required to afford the putative father a hearing.

In this case, however, the special circumstances of In re Lisa R. are not present. The minor child DANIEL TODD INMAN is not a ward of the state. Both his parents are living and contributing to his support and welfare, and both acknowledge their parentage and the child's legitimacy. Thus

the state interest in maintaining this arrangement outweighs any interest the appellant might have in establishing his paternity.

The appellant also argues that Tenn. Code Ann. § 36-302, as interpreted by the Tennessee Court of Appeals, terminates his parental rights without due process of law. (See Appellant's Jurisdictional Statement at 21-22, citing Lassiter v. Department of Social Services, 452 U.S. 18 (1981)). In the eyes of the law, the appellant is a stranger to the child, and has no parental rights with respect to the child. He cannot have his "parental rights" terminated when no court has determined that he has such rights. For this reason, the appellant's contention is wholly without merit. Accord Petitioner F. v. Respondent R., supra, 430 A.2d at 1079-80.

Because any constitutionally protected interest an alleged natural father may have in a child born to a married woman is outweighed by the compelling state interests in promoting the marital relation, maintaining the family unit, and protecting the child's status of legitimacy, a statute denying a putative father standing to assert his paternity does not deprive him of due process of law. For this reason, the question presented by the appellant does not merit plenary review.

CONCLUSION

For the foregoing reasons, the appellees JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN request this honorable Court to dismiss the appeal brought by JAMES LAWRENCE CUNNINGHAM.

Respectfully submitted,

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STEVEN LEE INMAN,
Appellees,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March 1984 I forwarded by first class mail, postage prepaid, three copies of the foregoing Motion to Dismiss to each of the following:

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